

RECEIVED
2010 SEP 29 AM 10: 27
FEC MAIL CENTER

Perkins
Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2003
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

Brian G. Svoboda
PHONE: (202) 434-1654
FAX: (202) 434-1690
EMAIL: BSvoboda@perkinscoie.com

September 29, 2010

Jeff S. Jordan
Federal Election Commission
999 E. Street, NW
Washington, D.C. 20463

Re: MUR 6343

Dear Mr. Jordan:

On behalf of Mike McMahon for Congress (the "Committee") and George Caputo, as treasurer, this letter is submitted in response to the Complaint filed by Brendan Lantry, dated August 4, 2010. The Complaint claims that the Committee used information obtained from Commission reports for the purpose of soliciting contributions. However, the Complaint fails to provide any credible support for this claim, and fails to state facts that, if true, would constitute a violation of the Federal Election Campaign Act of 1971 (the "Act"). The Commission should find no reason to believe that the Committee violated the Act, and should dismiss the matter immediately.

I. Facts

Mike McMahon for Congress is the authorized principal campaign committee for Representative Michael McMahon, who is running for re-election in New York's 13th Congressional District. Like most candidate committees, the Committee, in the ordinary course of its activities, monitors opponents' FEC reports, without making any use of the data for commercial or solicitation purposes.

On or about July 29, 2010, Jennifer Nelson, the Committee's then-spokesperson, acting without the authorization of Rep. McMahon or the Committee, provided a list compiled from a review of such data to the press, in an inappropriate attempt to attack Mike Grimm, one of Rep. McMahon's opponents. As soon as the Committee learned of this unauthorized disclosure, it terminated Ms. Nelson's employment.

Several days later, Ms. Nelson, again without Committee authorization, spoke to *Politico* about the incident. An August 3, 2010 article in *Politico* tendered inconsistent and inaccurate

74380-0001/LEGAL.19243030.1

ANCHORAGE • BEIJING • BELLEVUE • BOISE • CHICAGO • DENVER • LOS ANGELES • MADISON
MENLO PARK • PHOENIX • PORTLAND • SAN FRANCISCO • SEATTLE • SHANGHAI • WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

RECEIVED
FEDERAL ELECTION
COMMISSION
2010 SEP 29 AM 10: 31
OFFICE OF GENERAL
COUNSEL

11044292031

explanations by Ms. Nelson of the Committee's intended use of the list. She first stated that the list was compiled to "discuss [Grimm's] out-of-district money," but then stated that it was compiled "to identify specific voters that the congressman could reach out to via email or phone call or letter . . . [and have] them contribute money to his campaign." *Id.*

Seizing on Ms. Nelson's quotes in *Politico*, Brendan Lantry filed the present Complaint against the Committee on August 4, 2010. The Complaint relies entirely on the *Politico* article, which neither presents nor alleges any actual use by the Committee of Mr. Grimm's FEC report data, except for Ms. Nelson's own unauthorized disclosure to the press, which resulted in her termination. The Complaint alleges no sale or commercial use of the data, nor any actual use of the data to solicit contributions. No such use has occurred.

II. Legal Analysis

A. Legal Background

The Act provides that any information copied from reports or statements filed with the Commission "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee." 2 U.S.C. § 438(n)(4) (emphasis added); 11 C.F.R. § 104.15(a). Under Commission regulations, "soliciting contributions" includes soliciting any type of contribution or donation, such as political or charitable contributions. 11 C.F.R. § 104.15(b).

But the Act does not prohibit campaigns from reviewing and analyzing their opponents' FEC reports for non-fundraising, non-commercial purposes. To the contrary, Congress's sole purpose in enacting the "sale or use" provision was "to prohibit the list from being used for commercial purposes." 117 Cong. Rec. 30057-58 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon).

Indeed, the Commission has made clear that committees may use an opponent's FEC report data for non-commercial, non-solicitation, non-harassment purposes. See, e.g., Adv. Op. 1981-05 (allowing a candidate to contact a former opponent's donors and "set the record straight" about certain charges made during the campaign). See also Adv. Op. 2009-19 (permitting use of reports to notify Senator Specter's contributors that he had switched parties); Advisory Op. 1984-02 (allowing Senator Gramm's campaign to contact donors to a committee bearing his name, and tell them of its unauthorized status).

B. The Complaint Fails to State Facts That, If True, Would Violate the "Sale and Use" Provision

A valid complaint must present facts that, if true, would describe a violation of the Act. *See* 11 C.F.R. § 111.4; Commissioners Mason, McDonald, Sandstrom, Smith, Thomas and Wold, Statement of Reasons, MUR 5141; Statement of Reasons, MUR 4960. Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. Statement of Reasons, MUR 4960. Further, a "mere conclusory accusation without any supporting evidence does not shift the burden of proof to respondents." Commissioners Wold, Mason and Thomas, Statement of Reasons, MUR 4850.

The Complaint relies wholly on comments ascribed to Ms. Nelson, saying that the Committee compiled a list of FEC contributor information and *intended* to use that list to solicit donations. But even if *Politico* completely and accurately relayed Nelson's comments, and even if those comments were true, the Complaint would still fail to describe a violation of the Act. *See* 11 C.F.R. § 111.4; MUR 5141. Simply put, the Complaint fails to allege that the Committee actually *used* the list to solicit contributions.

The Act prohibits the *sale or use* of FEC data for commercial or fundraising purposes. 2 U.S.C. § 438(a)(4). Under the plain language of the statute, in order for a violation to occur, there must be an actual, impermissible *use* of FEC data – an impermissible solicitation or other commercial use. The legislative history and Commission precedent bolster this conclusion. The purpose of the provision is to prevent donors from facing harassment. 117 Cong. Rec. at 30057; Adv. Op. 2003-24. Simply to compile an internal list, without any actual, resulting solicitation or commercial use, would pose no such risk.

C. The Complaint Is Based Entirely on the Speculative Comments of a Fired Aide and May Not be Accepted as True

The Commission should dismiss the Complaint also because it relies entirely on a second-hand presentation of speculative and inconsistent statements by Ms. Nelson. When she spoke to *Politico*, she had just been terminated for making unauthorized, inappropriate comments to the press. She purported to discuss the internal activity of the Committee's finance team, of which she was not a part. And her explanations, as presented in the article, were shifting and inconsistent: she first claimed that the list was used to "illustrate out-of-town donations," then claimed that the "purpose was an analysis of potentially poachable donors," and finally stated that the list would allow the Committee to "identify specific voters that the congressman could reach out to . . . and having them contribute money to his campaign."

Ms. Nelson's statements that the list was compiled to solicit contributions for the campaign are inaccurate and in no way reflect the actual use of the lists by the Committee. Without any

Jeff Jordan
September 29, 2010
Page 4

additional supporting evidence as to the truth of these statements, they are "mere speculation" and cannot form the basis of a reason to believe finding.

III. Conclusion

For the reasons set forth above, the Committee respectfully requests that the Commission find no reason to believe that the Committee has violated the Act, and dismiss this matter immediately.

Very truly yours,



Brian G. Svoboda
Andrew H. Werbrock
Counsel to Mike McMahon for Congress

11044292034